The Free Flow of Information Act of 2007 **H.R. ____** **Section-by-Section Analysis**	
SEC. 1. SHORT TITLE *This Act may be cited as the "Free Flow of Information Act of 2007."*	This Act is intended to preserve the free flow of information to the public while protecting legitimate Government interests in law enforcement and civil justice. To ensure that the Act applies standards that are time-proven to protect legitimate and important interests in law enforcement and fair administration of civil justice, the Act applies, in large part, the principles embodied in the U.S. Department of Justice's *Policy With Regard to the Issuance of Subpoenas to the News Media*, 28 C.F.R. § 50.10 (the "DOJ Guidelines"). The DOJ Guidelines were adopted in 1973 and have been in continuous operation for more than 30 years. They set standards that the Government must meet before the Department of Justice can request the issuance of a subpoena against the news media in any Government civil or criminal case. At the same time, the Act embodies exceptions to its coverage that have no parallel in the DOJ Guidelines. As such, the Act would permit compelled disclosure of information in some circumstances that are not addressed by the DOJ Guidelines. These exceptions were drafted into the Act in order to respond to concerns expressed by some commentators, who worried that a federal shield law might be applied in such a way as to protect sources of genuinely harmful leaks. Accordingly, there are five exceptions to the provision protecting source information, each of which is discussed in detail below. Compelled disclosure of source information is permitted where – • disclosure is necessary to prevent imminent and actual harm to national security • disclosure is necessary to prevent imminent death or significant bodily harm • disclosure is necessary to identify a person who has disclosed a trade secret of significant value in violation of State or Federal law • disclosure is necessary to identify a person who has disclosed individually

	identifiable health information in violation of Federal law • disclosure is necessary to identify a person who has disclosed nonpublic personal financial information of a consumer in violation of Federal law By carving out these exceptions, the Act goes further than the DOJ guidelines in protecting legitimate interests in national security, law enforcement, and the administration of civil justice.
SEC. 2. COMPELLED DISCLOSURE FROM COVERED PERSONS. *(a) CONDITIONS FOR COMPELLED DISCLOSURE. – In any proceeding or in connection with any issue arising under Federal law, a Federal entity may not compel a covered person to provide testimony or produce any document related to information possessed by such covered person as part of engaging in journalism, unless a court determines by a preponderance of the evidence, after providing notice and an opportunity to be heard to such covered person –*	The Act is meant to apply to any Federal entity that can compel testimony or the production of documents. It does not, however, preempt any of the 32 current State shield laws or the common law reporter's privilege that has developed under State law. It also is not intended to interfere with the practice of Federal courts sitting in diversity jurisdiction to apply, under Federal Rule of Evidence 501, the shield law that would be applied by a State court hearing the same case under State law. This section provides that a covered person cannot be compelled to disclose sources or information unless a Federal court determines that the standards for compelled disclosure are met. The quantum of evidence needed to make this determination is the "preponderance of evidence" standard, which is the standard of proof applicable in most contexts in civil cases. The preponderance standard requires a court to find that it is *more likely than not* that the circumstances warranting compelled disclosure exist. The DOJ Guidelines do not specify what quantum of evidence is required to establish the circumstances warranting compelled disclosure. In the absence of a specified standard, presumably DOJ applies a preponderance standard. Moreover, two provisions of the DOJ Guidelines incorporate a "reasonable grounds to believe" standard, which is similar in concept to a preponderance standard. 28 C.F.R. § 50.10(f)(1), (2). This section of the Act further provides that a covered person must have effective notice and an opportunity to be heard before the court makes a decision to compel testimony or production of a document. This section makes clear that the Act applies only to information possessed by the covered person "as part of engaging in journalism" ("journalism" being a term defined

	in section 4). Thus, information relevant to matters such as commercial disputes involving media companies would not receive any protection. Accordingly, for example, a media company being investigated for alleged anticompetitive behavior would not be able to invoke the Act to shield it from responding to subpoenas.
(1) that the party seeking to compel production of such testimony or document has exhausted all reasonable alternative sources (other than a covered person) of the testimony or document;	This section applies the familiar "exhaustion" requirement on any request to obtain testimony or documents from the media. This concept is modeled after the DOJ Guidelines. The DOJ Guidelines' sections restricting subpoenas in civil and criminal cases require the party seeking to compel testimony or subpoena documents to "have unsuccessfully attempted to obtain the information from alternative nonmedia sources." 28 C.F.R. § 50.10(f)(3). This section of the Act also incorporates the qualifier "all reasonable alternative sources." The "reasonable" qualifier is based on 28 C.F.R. § 50.10(b) ("All reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the news media"). This standard also is consistent with the Federal common law that has developed in this area in the past 30 years
(2) that – *(A) in a criminal investigation or prosecution, based on information obtained from a person other than the covered person –* *(i) there are reasonable grounds to believe that a crime has occurred; and* *(ii) the testimony or document sought is essential to the investigation, prosecution or to the defense against the prosecution; or*	The standard used in the Act is taken from the DOJ Guidelines found at 28 C.F.R. § 50.10(f)(1). The Act provides that there must be "reasonable grounds to believe that a crime has occurred," based on information obtained from a person other than the covered person. The DOJ Guidelines likewise provide that "there should be reasonable grounds to believe, based on information obtained from nonmedia sources, that a crime has occurred." 18 C.F.R. § 50.10(f)(1). The Act further provides that the information sought must be "essential to the investigation, prosecution or to the defense against the prosecution." The DOJ guidelines require that the information sought be "essential to a successful investigation – particularly with reference to directly establishing guilt or innocence." *Id.* The DOJ Guidelines further provide that a "subpoena should not be used to obtain peripheral, nonessential, or speculative information." *Id.* This concept is reflected in Section 2(b)(2) of the Act, which provides that any compelled disclosure "be narrowly tailored in subject matter and period of time covered so as to avoid compelling

	production of peripheral, nonessential, or speculative information."
(B) in a matter other than a criminal investigation or prosecution, based on information obtained from a person other than the covered person, the testimony or document sought is essential to the successful completion of the matter;	This section applies a standard similar to the DOJ Guidelines' standard for civil litigation found at 28 C.F.R. § 50.10(f)(2) to all civil cases, administrative matters, and other proceedings that are not criminal investigations or prosecutions. This standard is based on the familiar policy consideration that any information sought must be "essential" to the case. This standard is, for practical purposes, identical to the common law that has developed in the Federal courts over the past 30 years, which generally provides that the information sought must be "necessary" to a party's claim or defense and must go to the "heart of the case."
(3) in the case that the testimony or document sought could reveal the identity of a source of information or include any information that could reasonably be expected to lead to the discovery of the identity of such a source, that – *(A) disclosure of the identity of such a source is necessary to prevent imminent and actual harm to national security with the objective to prevent such harm;*	This section provides that the identity of journalists' sources will generally be protected except where certain specified circumstances exist that warrant disclosure of source information. These circumstances are limited to protecting the following legitimate interests: the protection of national security, the prevention of death or significant bodily harm, and the identification of persons who disclose trade secrets of significant value, personal medical information, or personal financial information in violation of existing laws. This section is not intended to preempt State statutory or common law. The public interest in the flow of information is particularly strong when the information is provided to reporters by confidential sources. Without protection for the identity of these sources, many matters of crucial public importance would not become publicly known. For this reason, this section provides heightened protection for the identities of confidential sources. The section also recognizes that protecting the confidentiality of a source from being revealed through testimony is a hollow protection without a parallel protection for other information held by covered persons that could reveal the identity of confidential sources. Accordingly, that category of information is provided parallel protection. At the same time, this section provides five strictly defined exceptions to the prohibition on compelling disclosure of the identities of sources. These exceptions create grounds for compelled disclosure of source information in circumstances that are not even

	addressed in the DOJ Guidelines. The first is an exception for cases in which disclosure of the source's identity is necessary to prevent imminent harm to national security. This exception is intended to address concerns expressed by the Department of Justice that the protection of the identity of journalists' confidential sources could endanger national security. To ensure that courts do not reflexively order disclosure any time national security concerns are cited, this section requires that the disclosure be "necessary" to prevent "imminent and actual" harm to national security, and that the court's objective in compelling disclosure must be to prevent such harm.
(B) disclosure of the identity of such a source is necessary to prevent imminent death or significant bodily harm with the objective to prevent such death or harm, respectively; or	This provision is the second of five exceptions to the prohibition on compelling disclosure of the identity of sources. This exception applies where disclosure of a source's identity is necessary to prevent imminent death or significant bodily harm. To ensure that courts do not invoke this exception in circumstances where the anticipated harm is vaguely defined or remote, this section requires that the disclosure be "necessary" to prevent "imminent" death or "significant" bodily harm, and that the court's objective in compelling disclosure must be to prevent such harm.
(C) disclosure of the identity of such a source is necessary to identify a person who has disclosed – *(i) a trade secret of significant value in violation of a State or Federal law;*	This provision is the third of five exceptions to the prohibition on compelling disclosure of the identity of sources. This exception applies where the disclosure of a source's identity is necessary to identify a person who has disclosed a trade secret of significant value in violation of a State or Federal law. This provision is not intended to apply merely because a business entity claims that a source has stolen trade secrets. Some business entities might claim that virtually any information about the company's operation is a trade secret, including (for example) the location where the company dumped toxic waste decades ago. Instead, the exception is triggered only if a court determines (by a preponderance of the evidence) that disclosure of source-identifying information is necessary to identify a person who has disclosed a trade secret, that the trade secret is one of "significant value," and that it was disclosed in violation of a State or Federal law.

(ii) individually identifiable health information, as such term is defined in Section 1171(6) of the Social Security Act (42 U.S.C. 1320d(6)), in violation of Federal law; or	This provision is the fourth of five exceptions to the prohibition on compelling disclosure of the identity of sources. This exception applies where the disclosure of a source's identity is necessary to identify a person who has disclosed "individually identifiable health information" in violation of Federal law. The provision incorporates by reference the definition of "individually identifiable health information" contained in the Health Insurance Portability and Accountability Act of 1996 (HIPAA). This definition is as follows: The term "individually identifiable health information" means any information, including demographic information collected from an individual, that – **(A)** is created or received by a health care provider, health plan, employer, or health care clearinghouse; and **(B)** relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual, and – **(i)** identifies the individual; or **(ii)** with respect to which there is a reasonable basis to believe that the information can be used to identify the individual. The exception applies only if such information has been leaked "in violation of Federal law." Thus, this provision does not create any new law relating to the privacy of medical information; instead, the provision refers to existing Federal law.

(iii) nonpublic personal information, as such term is defined in section 509(4) of the Gramm-Leach-Bliley Act (15 U.S.C. 6809(4)), of any consumer in violation of Federal law; and	This provision is the fifth and final exception to the prohibition on compelling disclosure of the identity of sources. This exception applies where the disclosure of a source's identity is necessary to identify a person who has disclosed "nonpublic personal information" of any consumer in violation of Federal law. The provision incorporates by reference the definition of "nonpublic personal information" contained in the Gramm-Leach-Bliley Act of 1999. This definition is as follows: **(A)** The term "nonpublic personal information" means personally identifiable financial information – **(i)** provided by a consumer to a financial institution; **(ii)** resulting from any transaction with the consumer or any service performed for the consumer; or **(iii)** otherwise obtained by the financial institution. **(B)** Such term does not include publicly available information, as such term is defined by the regulations prescribed under section 6804 of this title. **(C)** Notwithstanding subparagraph (B), such term – **(i)** shall include any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any nonpublic personal information other than publicly available information; but **(ii)** shall not include any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived without

	using any nonpublic personal information. The exception applies only if such information has been leaked "in violation of Federal law." Thus, the provision does not create any new law relating to the privacy of personal financial information; instead, the provision refers to existing Federal law.
(4) that nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in gathering news and maintaining the free flow of information.	Once the court has applied subsections (1), (2), and (3) of section 2(a) and has determined that the party seeking disclosure has met all the requirements of those subsections, the court must then take the additional step of applying a balancing test to determine whether compelled disclosure is appropriate under this Act. This balancing test applies to all requests for compelled testimony or documents, regardless of whether or not the information sought relates to the identity of a source. The balancing test is based on the test suggested by Judge Tatel in *In re: Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 998 (D.C. Cir. 2005) ("[T]he court must weigh the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value."). Similarly, the DOJ Guidelines provide that "the approach in every case must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice." 28 C.F.R. § 50.10(a).4/26/2007
(b) LIMITATIONS ON CONTENT OF INFORMATION. – *The content of any testimony or document that is compelled under subsection (a) shall, to the extent possible –* *(1) be limited to the purpose of verifying published information or describing any surrounding circumstances relevant to the accuracy of such published information; and*	This section is modeled after the DOJ Guidelines, 28 C.F.R. § 50.10(f)(4), which provides that subpoenas generally should be limited to verifying published material. This principle from the DOJ Guidelines properly recognizes that the verification of information already made public is less intrusive and thus more protective of the free flow of information than requiring a covered entity to make public information that is internal or confidential. The DOJ Guidelines also provide that subpoenas should "be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material," 28 C.F.R. § 50.10(f)(6), a principle carried forward in this section.

(2) be narrowly tailored in subject matter and period of time covered so as to avoid compelling production of peripheral, nonessential, or speculative information.	
SEC. 3. COMPELLED DISCLOSURE FROM COMMUNICATIONS SERVICE PROVIDERS. *(a) CONDITIONS FOR COMPELLED DISCLOSURE. –* *With respect to testimony or any document consisting of any record, information, or other communication that relates to a business transaction between a communications service provider and a covered person, section 2 shall apply to such testimony or document if sought from the communications service provider in the same manner that such section applies to any testimony or document sought from a covered person.*	The DOJ Guidelines recognize that it is important to protect not only sensitive information held by the news media, but also information held by companies outside the news media that could reveal confidential sources and other information that is otherwise protected. In particular, the identity of confidential and other sources could be easily determined by obtaining the telephone, email and Internet records of covered entities, thus undermining the protections provided by Section 2 of the Act. Accordingly, the DOJ Guidelines were amended in 1980 to provide a broad range of protections to information held by telephone companies. DOJ Guidelines, 28 C.F.R. § 50.10(g). Adopting an approach similar to that of the DOJ Guidelines, the Act applies the same standards used to protect information held internally by the news media to records held by outside companies.
(b) NOTICE AND OPPORTUNITY PROVIDED TO COVERED PERSONS. – *A court may compel the testimony or disclosure of a document under this section only after the party seeking such a document provides the covered person who is a party to the business transaction described in subsection (a) –* *(1) notice of the subpoena or other*	The Act recognizes that the news media must have effective notice and a meaningful opportunity to be heard before a third party is required to provide information concerning the news media to the Government. Often, the entity to which a subpoena is directed has no incentive to resist disclosure. Such an entity usually will have no ability to know that records sought concern a journalist, and Federal law may make it impossible for such an entity to apprise the subject of a subpoena about the scope and nature of materials requested by a subpoena. Accordingly, this section requires that notice of any subpoena or process to a third party that concerns a covered person must be provided to the covered person at the time that subpoena or process is issued, subject

compulsory request for such testimony or disclosure from the communications service provider not later than the time at which such subpoena or request is issued to the communications service provider; and *(2) an opportunity to be heard before the court before the time at which the testimony or disclosure is compelled.*	to the exception contained in subsection (c), below. Similarly, the DOJ Guidelines establish a regime in which a member of the news media is to be given "reasonable and timely notice" of the government's intention to subpoena telephone records, unless such notification will pose a "clear and substantial threat to the integrity of the investigation." 28 C.F.R. § 50.10(g)(2), (3).
(c) EXCEPTION TO NOTICE REQUIREMENT. – Notice under subsection (b)(1) may be delayed only if the court determines by clear and convincing evidence that such notice would pose a substantial threat to the integrity of a criminal investigation.	This section recognizes that, in the context of certain investigations, providing notice to a covered person before information is sought from a third party may threaten the integrity of a criminal investigation. It thus adopts a standard similar to that set out in the DOJ Guidelines for the delay of such notice in the few extraordinary cases in which a delay is warranted. 28 C.F.R. § 50.10(g)(3).
SEC. 4 DEFINITIONS. *In this Act:* *(1) COMMUNICATIONS SERVICE PROVIDER. – The term "communications service provider"–* *(A) means any person that transmits information of the customer's choosing by electronic means; and* *(B) includes a telecommunications carrier, an information service provider, and an information content provider (as such terms are defined in sections 3 and 230 of the Communications Act of 1934 (47 U.S.C. 153, 230)).*	This section defines the "communications service provider" to which Section 3 would apply by incorporating existing definitions under Federal law. The term is intended to cover any telephone company, telecommunications carrier, Internet service provider, online service, or other communications provider that may be used for relaying messages of any kind. This definition, which is broader than the DOJ Guidelines' reference to "telephone toll records," 28 C.F.R. § 50.10(g), reflects the breadth of types of communication currently available.

(2) COVERED PERSON. – The term ''covered person'' means a person engaged in journalism and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person.	This section is meant to apply the protections of the Act to any person engaged in "journalism" (defined in subsection (5), below). The term "person" is defined by preexisting statute to "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. Thus, the Act would apply to all forms of media that provide information to the public, including newspapers, magazines, book publishers, television networks and stations, cable and satellite networks, channels and programming services, news agencies and wire services. In addition, the Act would apply to web logs ("blogs") that engage in journalism.
(3) DOCUMENT. – The term ''document'' means writings, recordings, and photographs, as those terms are defined by Federal Rule of Evidence 1001 (28 U.S.C. App.).	This definition provides that the term "document" should be interpreted as broadly as possible to encompass any types of writing, recording or photograph covered by the Federal Rules of Evidence and the Federal Rules of Civil Procedure in any form whatsoever – print, electronic or ephemeral – that could be sought from a covered person.
(4) FEDERAL ENTITY. – The term ''Federal entity'' means an entity or employee of the judicial or executive branch or an administrative agency of the Federal Government with the power to issue a subpoena or provide other compulsory process.	The definition of "Federal entity" is meant to be read broadly so that any instrumentality of the Federal Government that has the power to compel testimony or seek documents from covered persons in any forum or proceeding whatsoever is subject to the Act. This definition would encompass Federal courts, administrative agencies, executive bodies, and any other Federal tribunal, commission, or body. It would not, however, cover Congress.
(5) JOURNALISM. – The term "journalism" means the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.	The definition of "journalism" is intended to afford the protections of the Act to any person engaged in any phase of the journalistic process, from gathering news and information to writing, editing, and publishing news and information. The inclusion of the term "or information" is intended to include within the ambit of the Act such media as newsletters and wire services that disseminate information not necessarily encompassed by the term "news." On the other hand, the definition is intended to be limited by the term "…that concerns local, national, or international events or other matters of public interest for dissemination to the public." Thus, the Act would provide no protection to a person who gathers information with the intention of using it to gain

	private advantage, rather than disseminate it to the public. If the recipient of a leak is a spy, a terrorist, or a company intending to exploit leaks from a competitor, the Act will not afford any protection to that person. The wording of the last phrase of this section is borrowed from the New York state shield statute, which defines "news" as "written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare." New York Civil Rights Law § 79-h.